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No. 96-1910

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARIA FELINSKA,

Petitioner,

v.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the First Circuit correctly affirmed the district court's judgment that Petitioner Maria Felinska ("Felinska") was not constructively discharged because of her age when she resigned from Respondent New England Teamster and Trucking Industry Pension Fund ("Fund") for the third time in less than two years, after Fund officials repeatedly urged her not to do so.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent New England Teamsters and Trucking Industry Pension Fund, by its undersigned counsel, submits this brief in opposition to the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

A. The Employment Action That Gave Rise to Petitioner's Claims.

Respondent New England Teamsters and Trucking Industry Pension Fund ("Fund") hired Petitioner Maria Felinska in 1965, initially as an assistant to the Fund's bookkeeper and later as bookkeeper. Although her work was competent, her supervisors noted that she was sometimes uncooperative, did not delegate, and occasionally had difficulties gettting along with her co-workers.

In 1975, the Fund hired another bookkeeper, Dot Langone, who shared the bookkeeping duties with Felinska until Ms. Langone retired in 1988. In the spring of 1989, Helen Debreceni, then the Fund Manager, approved the request of another Fund employee, Marilyn Tower, to transfer to Langone's position, and assigned Felinska to train her. Felinska did not object to either the transfer or the training assignment.

In the summer of 1989, however, Debreceni made other organizational changes, such as designating Arlene (Doddy) Brewster as supervisor of the unit in which both Felinska and Tower worked. Brewster was somewhat overbearing and tactless with all employees, and she and Felinska did not get along. In addition, Brewster supervised Felinska more closely than Felinska's predecessors had done, and there were altercations between them.

During 1989 and 1990, the Fund began to automate its accounting system. Outside consultants were retained to install the system and to train Felinska and Tower on the computer. Although Felinska claimed that she was denied training and access to the new system, she admitted that the computer was in the room shared by herself and Tower, that she had the opportunity to practice on it, and that the computer consultant trained her to perform a number of key bookkeeping functions on the new system. Tower had more computer expertise than Felinska, however, and sometimes was given computer-related tasks when Felinska was not. Nevertheless, Felinska continued to have primary responsibility for a number of important bookkeeping functions. She maintained her title and position, and she continued to receive salary increases throughout her employment at the Fund.

In February 1990, Felinska resigned in order to take a job with Chemical Bank. Debreceni talked her out of leaving, and Felinska withdrew her retirement notice. In October 1990, Felinska again resigned, this time because her

job made it difficult for her to travel to New York City on the weekend. Debreceni again asked her to stay, and agreed to allow her to leave 15 minutes early every Friday to facilitate her weekend travel. Once again, Felinska changed her mind and decided to stay at the Fund.

In October 1990, Debreceni retired, and Charles Langone became Fund Manager. Langone continued the two-bookkeeper staffing pattern instigated by his predecessors for several reasons. First, he wanted a back-up for Felinska when she was out of the office or on vacation. Second, he wanted a more timely end-of-the-year closing of the Fund's books than Felinska had been able to accomplish alone. Finally, the Fund's outside accountants had advised that two bookkeepers were advisable for control purposes.

Although Felinska subsequently maintained that her working conditions were intolerable during the period she worked for Langone, primarily because of harassment from Brewster, she could only recall complaining to Langone twice prior to her third and final resignation. Even in those instances, she knew only that she said Brewster was "impossible." Although she threatened to quit in January, 1991, Langone asked her to stay and she agreed.

On March 29, 1991, Felinska told Langone that she could no longer work with Brewster, citing two incidents: Brewster questioned her need to leave two hours early, and she instructed Felinska to follow incorrect directions about a computer entry. Langone asked her at least three times to "stay" at the Fund. She refused, insisting that she wanted to leave that day. Later that morning she changed her mind, however, because she liked the Fund, liked working, and liked talking with her friends there. Langone was tired of her pattern of resigning and then changing her mind, and would not let her withdraw her resignation.

Felinska completed the paperwork for retirement without further protest, and began receiving her pension. Four

months later, she filed a written appeal with the Fund, asking to receive the new, higher pension benefits that had been approved after she retired, or to return to Fund employment. The Fund denied her request, just as it denied the request of the numerous other similarly situated pensioners who retired prior to the announcement of the new benefit structure. The Fund also denied her request to return to her bookkeeping position.

B. Proceedings in the Courts Below.

In 1993, Felinska filed a 14-count complaint against the Fund and Langone, alleging violations of various federal and state laws. The district court dismissed nine of her claims in 1994, and granted the Fund's motion for summary judgment as to the remaining counts in 1996. Felinska appealed only the finding that she had not established a prima facie case of age discrimination against the Fund. The Court of Appeals affirmed, and Felinska appealed to this Court.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals is correct, and review by this Court is not warranted. This is a routine employment discrimination case, which presents no conflicts between the circuits, no unresolved or controversial question of federal law, and no departure from Supreme Court precedent. Although Felinska argues that the Court of Appeals' decision is inconsistent with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), she incorrectly cites the rule of those cases and produces no facts supporting her argument.

Felinska argues that the Fund's reasons for its employment action were pretextual, allowing an inference of age discrimination. The Fund's alleged "mendacity" is not at issue. The courts below assumed the truth of Felinska's version of the facts, not the Fund's. Even under Felinska's

facts, she did not prove the third element of a prima facie case of age discrimination under *McDonnell Douglas*: she was not discharged, either actively or constructively. Instead, she voluntarily resigned.

Even if she had proved a prima facie case, the record does not support her claim that the Fund's reasons for assigning an additional bookkeeper to assist Felinska were a pretext to force her to resign. Moreover, Felinska's summary of this Court's *Hicks* decision is incorrect, because she does not acknowledge that *Hicks* requires her to establish a link between the Fund's actions and her age.

REASONS FOR DENYING THE PETITION

I. THE COURTS BELOW CORRECTLY CONCLUDED THAT FELINSKA DID NOT ESTABLISH A *PRIMA FACIE* CASE

In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), this Court set out the elements of a prima facie case of race discrimination under Title VII. Subsequent decisions of this Court and other courts have applied the *McDonnell Douglas* framework to other forms of discrimination, such as age discrimination. *See, e.g., O'Connor v. Consolidated Coin Caterers Corp.*, —U.S. —, 116 S. Ct. 1307 (1996); *Greenberg v. Union Camp Corp.*, 48 F.3d 22 (1st Cir. 1995). In order to establish a prima facie case of age discrimination, the plaintiff must establish that

> (i) [she] is a member of a protected class, i.e., over forty years of age, (ii) [her] job performance was sufficient to meet [her employer's] legitimate job expectations, (iii) [she] was actually or constructively discharged, and (iv) [her employer] sought a replacement with roughly equivalent qualifications.

Greenberg, 48 F.3d at 26 (citations omitted).

The decisions of the lower courts in this case are consistent with Supreme Court precedent. Felinska could not prove constructive discharge, as required by *McDonnell*

Douglas and its progeny, because her working conditions were not "so difficult or unpleasant that a reasonable person . . . would have felt compelled to resign." *Greenberg*, 48 F.3d at 27 (citation omitted).

Felinska's working conditions were objectively tolerable. She retained her bookkeeper title throughout her tenure at the Fund. In addition, she received salary increases every year at the Fund, including the period beginning in 1989, when she claimed that working conditions became intolerable. A raise of any size indicates the contrary. See e.g., *Stetson v. Nynex Serv. Co.*, 995 F.2d 355, 360-61 (2d Cir. 1993). See also *Nunez-Soto v. Alvarado*, 918 F.2d 1029, 1030-31 (1st Cir. 1990); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119-20 (1st Cir. 1977); *Schuler v. Polaroid Corp.*, 44 Fair Emp. Prac. Cas. (BNA) 1415 (D. Mass. 1987), *aff'd.*, 848 F.2d 276 (1st Cir. 1988).

Although Felinska claimed that harassment by her supervisor, Doddy Brewster, was intolerable, the incidents she cited were no more than close monitoring and tactless comments about her slow pace. Close monitoring and reprimands, however, are not enough to show that working conditions are intolerable. *See Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159, 1162 (3d Cir. 1993), *cert. denied*, 510 U.S. 964 (1993); *Caslin v. General Electric Co.*, 696 F.2d 45, 46-7 (6th Cir. 1982); *GTE Prods. Corp. v. Stewart*, 421 Mass. 22, 653 N.E. 2d 161 (Mass. 1995).

Moreover, Felinska produced no admissible evidence of comments about age, plans to terminate her or other actions designed to force her out of the Fund. Although she claimed "all her duties" were removed, she admitted to performing at least five important bookkeeping functions until the day of her departure. Reassignment of duties is not in itself evidence of constructive discharge, even if it leaves Plaintiff with work she likes less. *See Schuler*, 44 Fair Emp. Prac. Cas. (BNA) at 1417.

Finally, Felinska's tenure at the Fund demonstrates that conditions were not intolerable. Between 1989 and 1991,

she resigned and then asked to rescind her resignation three times. The last of these resignations forms the basis of this lawsuit. Even then, Felinska changed her mind and asked to return to the Fund, because she liked her work and her co-workers. If a plaintiff seeks or is asked to return, then conditions are not "intolerable" and there is no constructive discharge. *See Radvilas v. Stop & Shop, Inc.*, 18 Mass. App. Ct. 431, 440 n.14, 466 N.E. 832 (1984); *GTE Prods. Corp. v. Stewart*, 421 Mass. 22, 653 N.E. 2d 161 (Mass. 1995); *Contardo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 753 F. Supp. 406, 411 (D. Mass. 1990). *See also Henn v. National Geographic Society*, 40 Fair Emp. Prac. Cas. (BNA) 1186 (N.D. Ill. 1986), *aff'd.*, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987). Felinska's conduct belied any claim of intolerable working conditions.

II. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH SUPREME COURT PRECEDENT REGARDING PRETEXT

Felinska's argument about the Fund's alleged "mendacity" is not entirely clear. Assuming she contends that any such allegation obviates the need for establishing a prima facie case, the Fund submits that she has not established either pretext or the nexus with age discrimination that *Hicks* requires.

Throughout all stages of litigation, the plaintiff bears the burden of persuading the trier of fact that discrimination was the reason for the defendant's actions. *See Hicks*, 509 U.S. at 507. Once the defendant has rebutted the prima facie case by articulating a legitimate, nondiscriminatory explanation for its actions, the plaintiff must prove that the articulated reason is a pretext for discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 720 (1st Cir. 1994); *Schuler*, 44 Fair Emp. Prac. Cas. (BNA) at 1416. To show pretext, the plaintiff must prove both " 'that the proffered

reason was not the true reason for the employee decision' *and* that [discriminatory motive] was." *Hicks*, 509 U.S. at 508 (emphasis added) (quoting *Burdine*, 450 U.S. at 256). Thus, under *Hicks*, a plaintiff fails to carry her burden if she does not show both that the defendant's explanation of its conduct is false *and* that discrimination motivates the employer's actions. Felinska did not satisfy either of the elements required by *Hicks*, and therefore failed to establish pretext.

First, Felinska failed to show that the Fund's reasons for transferring Tower to the bookkeeping department were false. She claimed that the Fund transferred Tower to the bookkeeping department in order to replace her, but produced no evidence of such a plan. Moreover, the record showed that it was consistent Fund practice to employ two bookkeepers, and that this had been the case for much of a 20-year period, including the period in which Felinska was a Fund employee. After Dot Langone retired, leaving Felinska as the only bookkeeper in the department, it was reasonable for the Fund to transfer or hire an individual to fill the vacant position, help Felinska in her bookkeeping duties, and provide a "back-up" in case Felinska was on vacation or unavailable. Felinska was never replaced by Tower, nor was there ever a suggestion that she would be.

Second, even if Felinska had offered sufficient evidence to suggest that the Fund's articulated reasons for transferring Tower were false, she failed to prove that the proffered reasons were a pretext for discrimination, because she did not establish any nexus between the Fund's actions and her age. In failing to do so, she missed the most critical part of the inquiry under *Hicks*: she must show a link between Defendant's alleged "mendacity" and her age. In other words, she must show that the Fund wanted to discharge her *because she was old*. As the Supreme Court noted in *Hicks*:

> . . . a reason cannot be proved to be "a pretext for discrimination" unless it is shown *both that the reason was false, and that discrimination was the real reason.*
>
> Once the defendant "responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide" not (as the dissent would have it) whether that evidence is credible, but "whether the rejection was discriminatory within the meaning of Title VII."

509 U.S. at 515-519 (emphasis supplied). *Accord Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1091-92 (1st Cir. 1995); *Udo v. Tomes*, 54 F.3d 9, 13 (1st Cir. 1995).

Felinska did not even begin to prove that she was terminated because she was old. There was not a single age-related remark alleged in this case. Felinska never complained to any Fund employee about age discrimination during her employment. She does not know whether her experiences were attributable to her age. When asked how the Fund harassed older people, she could only identify a *young* person who was "harassed." The Fund had no pattern of terminating older employees, or indeed, of terminating employees of any age. Two thirds of the Fund's employees were over age 40. Those identified by Felinska as the source of harassment—Debreceni, Brewster, Brown and Hurst—were 64, 57, 61 and 63 at the time of Felinska's resignation in March 1991, only a few years younger than Felinska's age 66. Felinska worked with all of these individuals for many years before she resigned. There was no evidence of age discrimination in this case.

III. FELINSKA HAS PRODUCED NO EVIDENCE OF A GENUINE ISSUE OF MATERIAL FACT WARRANTING TRIAL

Felinska claims that the Court of Appeals "ignored the bulk of the summary judgment record respecting clear disparate treatment in favor of the younger co-worker . . ."

and that summary judgment was therefore inappropriate. Felinska did not identify any part of the record, let alone "the bulk" she claimed. In any case, Felinska's argument does not present any unresolved or controversial question of federal law. Consequently, no issue has been presented for this Court to decide.

IV. THE DECISION OF THE COURT OF APPEALS TURNED UPON THE FACTS OF THE CASE AND WILL NOT AFFECT PERSONS OTHER THAN THE LITIGANTS

The opinions below applied established precedent to the specific facts of this case, not a new or disputed legal theory. There was no departure from that precedent in the application of the law to the facts. Based on the facts, the courts below determined that Felinska was not a victim of age discrimination. The Court of Appeals' decision has no application beyond the factual circumstances presented by this case, and therefore will have little impact on anyone other than the parties to this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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